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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1488

ROGERS C. B. MORTON, Secretary of Interior,
Appellant,

v.

STATE OF NEW MEXICO, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE WILD HORSE ORGANIZED ASSISTANCE, INC.

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INTEREST OF AMICUS CURIAE

Wild Horse Organized Assistance, Inc. ("WHOA!") is a nonprofit corporation organized for the purpose of sponsoring the protection of wild horses in the Western United States.[1] WHOA! has, since its incep-

[1] This brief is filed with the consent of both parties pursuant to Rule 42 of the Supreme Court Rules.

tion, had a primary purpose of urging control and prevention of the slaughter of wild free-roaming horses and burros.

Indeed, WHOA! has, through Mrs. Velma B. Johnston (Wild Horse Annie), Chairman of its Board of Trustees, testified before Congress in conjunction with both Pub. L. No. 86-234, 86th Cong., 1st Sess. (1959) (commonly known as the Wild Horse Annie Act), which forbade the hunting of wild horses and burros on public land by use of aircraft or motor vehicles, and Pub. L. No. 92-195, 92nd Cong., 1st Sess. (1971), the Wild and Free-Roaming Horses and Burros Act, which is the subject of this case. In each instance, WHOA! testimony has demonstrated the necessity for federal legislation protective of wild and free-roaming horses and burros and has highlighted the relationship of such wild and free-roaming horses and burros to the historical and natural value of western lands, especially public lands in the west.

Since WHOA!'s very purpose is the protection and preservation of wild and free-roaming horses and burros as a valuable part of American heritage and the present public land system, and since WHOA! submits that the Wild Free Roaming Horses and Burros Act is the only adequate protection currently afforded wild and free-roaming horses and burros, WHOA! is greatly interested in the Court's decision concerning the constitutionality of that Act.

SUMMARY OF ARGUMENT

The history of wild horses and burros in the Western United States, a story of man's destruction of nature, is saved from a complete tragedy only by the almost too late recognition by Congress of a responsibility to

all the citizens of the United States to preserve these natural inhabitants of the prairies from total destruction. Before the creation of the states and federal government, these wild creatures wandered over the vast grasslands of the west, subject only to natural laws of survival. The horses and burros were part of the natural balance in which animal, water and land merged into a unified system of life.

The survival of wild and free-roaming horses and burros as components of this system of life on the prairies has been seriously threatened by their value to man, and prior to intervention of the federal government by virtue of the Wild Free Roaming Horses and Burros Act, it appeared that horses and burros would be exterminated by man. Thus, these elements of the natural system of life on the western lands were about to be completely destroyed.

Congress, however, has now acted to preserve wild and free-roaming horses and burros as integral parts of the lands owned by all the citizens of the United States, the public lands. In so acting, Congress has validly exercised its powers under the Constitution in order to preserve integral components of the public lands system.

ARGUMENT

All parties to this case agree that the sole question involved in this case is whether the Wild Free Roaming Horses and Burros Act is within the scope of powers conferred upon Congress by the Property and Commerce Clauses of the United States Constitution.

Because WHOA! contends that the Property Clause provides an entirely appropriate basis for upholding

the congressional action under scrutiny, without the necessity for inquiry into the Act's validity under the broad congressional powers over interstate commerce, WHOA!'s argument will be confined to a discussion of the Act's validity under the Property Clause. Thus, this brief will argue that the Act is within the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States . . ." U.S. Constitution, Article IV, Section 3, Clause 2.

WHOA! submits that Congress may, without question, promulgate measures necessary for the regulation of the system of public lands and the multiple-use of such lands. Since Congress had validity determined that wild and free-roaming horses and burros are integral parts of the public lands and, in fact, constitute components of such lands necessary for and valuable to the preservation of the natural system of the public lands, the Act must be viewed as a "needful regulation" of public land valid under the Property Clause.

It is apparent that there are two fundamental propositions underlying the Act. First, the legislative history, and plain language, of the Act demonstrate that Congress was seeking, in connection with wild and free-roaming horses and burros, the implementation of a multiple-use concept of public land management. Thus, Congress expressly rejected the setting aside of specific ranges upon which wild horses and burros could run free from encroachment by mankind. Conference Rep. No. 92-681, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971).

Instead, it was Congress' intention that wild and free-roaming horses be part of a multiple-use of public

lands and that, therefore, wild and free-roaming horses should be permitted to roam without restriction to particular ranges. In this fashion, the entire expanse of public lands continues to be open for a multitude of uses and the natural setting of the lands is preserved.

This concept of multiple-use of public lands is demonstrated in Senate Report No. 92-242 in which it is provided that:

> "During the course of the April 20 hearing, witnesses repeatedly urged that the wild free-roaming horses and burros be considered a part of the multiple-use system of the public lands and not be placed in set aside areas for their exclusive use . . . It is the intent of the Committee that the wild free-roaming horses and burros be specifically incorporated as a *component of multiple-use management plans* governing the use of the public lands." (emphasis added) S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971)

Consequently, it is apparent that the existence of wild and free-roaming horses and burros has been found by Congress to be one of the valuable elements in the multiple-use of public lands.

As a second basis of the Act, and a means of accomplishing this multiple-use plan for public lands through the preservation of wild and free-roaming horses and burros, Congress sought to integrate the treatment of wild horses into the entire management of the natural system of public lands. Thus, these animals, which for decades have roamed free over the prairie in the Western United States, have been identified by Congress as a basic component of land usage itself. This concept of the dynamic interaction of wild and free-roaming

horses and burros with the public lands is demonstrated in the purpose clause of the Act which provides, in part, that the wild and free-roaming horses and burros:

> "are to be considered *in the area where presently found,* as *an integral part* of the natural system of the public lands." Pub. L. No. 92-195, 92d Cong. 1st Sess. (1971) (emphasis added)

Thus, Congress studied wild and free-roaming horses and burros and found their existence on the public lands in the Western United States to constitute a basic component of that system of lands. Indeed, Congress has concluded that wild and free-roaming horses are creatures basic to the public lands in the Western United States.

Wild and free-roaming horses and burros roam on public lands and are part of the public land heritage of all citizens of the United States. Consequently, Congress found those areas, that is, the public lands, were enhanced by the existence of wild and free-roaming horses and Congress established a statutory scheme in which wild and free-roaming horses could not be indiscriminately destroyed. Such free destruction would disrupt the natural system under which public lands have been preserved for the American people. Thus, in Senate Report 92-242, the Interior and Insular Affairs Committee stated:

> "During the course of the hearing, knowledgeable witnesses urged that emphasis be shifted from a range or refuge concept for protection and management of the animals to consideration of the wild free-roaming horses and burros as a component of the public lands in an integral part of the multiple-use management system. The Committee believes that such action would be in the best interest of multiple-use resource management and would best serve the overall intent of the legislation."

Further, in the Conference Report No. 92-681, which accompanied the final measure, the Conference Committee stated that:

> "Reliance on ranges, and particularly, fenced ranges, would defeat the purpose of the legislation, that is, the survival of wild free-roaming horses and burros, and substitute a zoo like concept. The conferees are of the opinion that the confinement of these animals to such ranges, except in unusual circumstances, should be discouraged and that the animal should be considered as integral parts of the public lands, which should be administered on concepts of multiple use."

Within this context, there can be no question that wild and free-roaming horses and burros were determined by Congress to be components of the public lands.

The authority of the Congress in the management and control of public lands and components of public lands is supreme. Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein and it may deal with such lands precisely as an ordinary individual might deal with his own property. *State of Alabama* v. *State of Texas,* 347 U.S. 272 (1954), *reh. denied,* 348 U.S. 950.

Thus, Congress has power over public lands and that power is enhanced by the Supremacy Clause of the Constitution in a manner such that Congress may act in this area without limitations and its actions take precedent over actions of states in an identical area of interest. *Federal Power Commission* v. *Idaho Power Company,* 344 U.S. 17 *reh. denied,* 344 U.S. 910 (1952); *United States* v. *State of California,* 332 U.S. 19

(1947); *Utah Power & Light Company* v. *United States*, 243 U.S. 389 (1917); *United States* v. *Grayline Water Tours of Charleston*, 311 F.2d 779 (4th Cir., 1962). In effect, Congress is a trustee of public lands for all of the people and must preserve the public lands, as well as the components thereof, for the good of the people. *United States* v. *City and County of San Francisco*, 310 U.S. 16 (1940), *reh. denied*, 310 U.S. 857. The Property Clause having been often interpreted as a mandate for Congressional action regarding public lands consistent with the trust to preserve such public lands for the citizens of the United States, there can be no doubt that regulation and control of such integral components of the public lands as the wild and free animals roaming thereon is indeed within the scope of the Property Clause.

Illustrative of the reason for congressional recognition of wild and free-roaming horses and burros as components of the public land and its responsibility for the preservation of wild horses and burros as such components of the public lands is the history of slaughter of wild horses and burros on these lands that are owned by all the citizens of the United States. Indeed, it is instructive of the background of the Wild Free-Roaming Horses and Burros Act to discuss the history that is responsible for congressional recognition of the horses and burros integral connection with public lands which supports the enactment of measures protective of wild horses and burros.

Numbering around 2,000,000 at the turn of the century, wild and free-roaming horses had actually been reduced to an entire population of 25,000 throughout the entire west by the 1950's. The actual turning point in their history came with the rise of the canned pet

food business, and the demand for fresh horse meat sold in pet food shops. Once the big slaughter got underway, the wild horse was doomed, for now his extermination served two purposes: A vast amount of range clearance was accomplished, and his carcass provided cheap meat for the processors with a tidy profit for the captors, the professional hunters. Although not so highly commercially exploited, wild burros fared no better in extermination programs.

The old technique of rounding up horses with crews of mounted riders was too slow, cutting down the profits, so the cowboys took to the air. Mustangs were driven at breakneck speed by low flying planes from their hiding places in the rough and barren rimrock areas onto flatlands or dry lake beds, where the chase was taken up by hunters on fast moving trucks which pursued the animals until they were close to collapse from exhaustion. Securely tied, they were dragged up rough ramps into waiting transport trucks for the long haul to slaughtering houses. Sometimes they were driven into box canyons from which there was no escape, or into manmade trap corrals where their violent contact with wood and wire caused serious and painful injuries.

Physical condition of the wild horses was of no concern, as the only requirements at processing centers were that the animals be ambulatory and in quantity, for which the mustangers were paid by the pound on the hoof. Since returns depended upon quantity, handling of the animals was ruthless, cruel and indiscriminate. Animals were maimed and mutilated, but not killed which would have been more merciful but were punished through such mechanisms as shotgun

blasts in order to keep them on the run. This history was placed before Congress by Mrs. Velma B. Johnston (Wild Horse Annie) on behalf of WHOA! prior to passage of Public Law No. 86-234, 86th Cong., 1st Sess. (1959) and such history was incorporated in the Senate Report on the measure. S. Rep. No. 81-802, 86th Cong., 1st Sess. (1959).

On September 8, 1959, the federal government took the initial step to halt this campaign leading towards extermination when President Eisenhower signed Public Law 86-234 which prohibits the use of aircraft or motorized vehicles to hunt certain wild horses and burros on land belonging to the United States. This measure, however, did not prove strong enough.

Responsibility for enforcement of Public Law 86-234 (Wild Horse Annie Act) rested with local and state officials. Wild horses and burros exist in states whose wide expanses of open range provide grazing for domestic livestock and habitat for target animals. Being neither an edible nor a trophy animal, the wild and free-roaming horses and burros are considered intruders by some. Lack of action by local authorities allowed the continued use of aircraft and vehicles in the harvesting of horses and burros.

Since efforts toward enactment of stronger management, protection and control measures have had historically little or no success on the state level, it became apparent that only federal action could prevent continued commercial exploitation of wild horses and burros which roam on the public lands in the west.

When the fate of the animals rested with the separate states, "harvests" by commercial mustangers and other rancher sponsored operations were much more

widespread than Congress had believed in 1959. Although use of aircraft and motorized vehicles had been outlawed in 1959, illegal use of aircraft continued and water-trapping proved to be a successful method of capture. Therefore, Congress concluded that the "harvests," possible and profitable under state laws, were responsible for the declining population. Had they continued, there would have been no wild horses in a relatively short time and this element of the natural system of public lands would have vanished. Obviously, the need for legislation to remove them from the jurisdiction of the several states and thereby, save them for the public lands was great. The Act under review here was the answer to that need.

In a breakdown of the combined wild horses and domestic livestock use in our ten western states, wild and free-roaming horse use is 2.9% while domestic livestock use is 97.1%. Congress sought in the Act only to preserve this small portion of the total horse population as a valuable component of the public lands. Without this element, the public lands would be less valuable for all citizens.

CONCLUSION

WHOA! submits that Congress has validly determined wild and free-roaming horses and burros to be integral components of the public lands and has found that the survival of such animals is necessary for the protection and preservation of the natural system of public lands. Congress has the power under the Property Clause to protect and preserve the public lands through statutes preserving components integrally related to public lands. Therefore, the Wild Free-

Roaming Horses and Burros Act is founded upon a sound constitutional basis and is valid.

Respectfully submitted,

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